Supreme Court, U.S.
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No. 97-1683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Petitioners") respectfully submit this Reply to Brief in Opposition in further support of their request that this Court issue a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed November 3, 1997 and amended January 14, 1998 in this matter.

PRELIMINARY STATEMENT

Knowing full well that Petitioners' request for a writ of certiorari has merit, Respondents' opposition brief largely avoids the main issue presented—that Petitioners have been denied due process by the Ninth Circuit's retroactive application of Bankruptcy Rule 7004(f), thereby exposing them to potential liability on claims which would have otherwise been time barred by the applicable Statutes of Limitations.[1] Instead, Respondents:

- mischaracterize Petitioners' argument as seeking to prevent the retroactive application of a jurisdictional statute to confer jurisdiction over Petitioners on an otherwise valid action;
- rely on the above mischaracterization to claim that the Ninth Circuit's decision is not contrary to precedent;
- erroneously urge the Court to forego review because the Ninth Circuit is the only Court of Appeals to have decided the issue before the Court on this Petition;
- claim that review should be withheld because two other jurisdictional bases allegedly exist, even though those bases were wrongly relied upon by the lower courts and completely ignored by the Ninth Circuit in rendering its decision below;
- contend that the Court should not review a determination of fact even though no facts have been found by any court, as the issues have been presented in the context of a motion to dismiss; and

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[1] The only mention in Respondents' brief of the fact that the Statutes of Limitations for the underlying claims for relief have run and their claims for relief are time barred is in a footnote in which they state (without citation to any authority) that the filing of the Amended Complaint tolled the Statute of Limitations. This is a misstatement of the law. If there was never any jurisdiction over Petitioners, as Petitioners contend, the Statute of Limitations would continue to run. And Idaho, like many other states, does not have a savings statute.

- argue that the Ninth Circuit did not abuse its discretion in determining that it was just and practicable to retroactively apply Bankruptcy Rule 7004(f) even though by doing so, it effectively sanctioned the violation of Petitioners' due process rights by resurrecting claims that would otherwise be time barred under the applicable Statutes of Limitations.

And, in a desperate attempt to make this end run around the substance of the Petition more palatable, Respondents repeatedly and erroneously accuse Petitioners of misleading the Court (as to matters wholly collateral to the central issue to be decided herein) without a single cite to the record to corroborate their vexatious claims.[2] As set forth in greater detail below, each of Respondents' arguments are unavailing and the Petition must be granted.

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[2] Indeed, from the beginning of the opposition brief (pp. 2-3), Respondents cast Petitioners as "foreign investors with a prior track record of engaging in speculative investments for the primary purpose of enriching themselves at the expense of others," and carelessly state that they "seized control of Gulf . . . an insolvent natural resources company" and "bled Gulf dry." What this invective ignores is that at the time of the acquisition, Gulf's SEC filings affirmatively represented to the investing public that it was solvent and its shares were trading on the New York Stock Exchange at prices ranging from $9-14 per share. Far from looting the company, Petitioners invested $41 million of their funds to acquire their shares. Moreover, Respondents fail to disclose that, at the time that the shares were acquired, Petitioners signed a standstill agreement ensuring that not less than fifty percent of the members of Gulf's Board of Directors would be independent directors and that all of the decisions called into question below were made not just by Petitioners but by the independent directors of Gulf as well. And, the standstill agreement further provided that Gulf could not enter into any transaction or maintain any business relationship with any director or officer of Gulf or any security holder who owns more than five percent of Gulf's voting securities without the prior written approval of at least two-thirds of Gulf's Board of Directors.

REPLY TO NEW POINTS RAISED BY RESPONDENTS

A. The Ninth Circuit's Decision Merits Review By This Court

Respondents first claim that although the decision by the Ninth Circuit relied on this Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), "Petitioners fail to allege that either of these precedents was in any way wrongly decided" (Opp. Brief, p. 10). Respondents further attack Petitioners for allegedly failing to "point . . . to [any] other federal court decision that analyzes similar issues and reaches a different result" (Opp. Brief, p. 11). In making these statements, Respondents disingenuously ignore the over 2 pages of discussion in the Petition as to why *Landgraf* and *McGee* are distinguishable from the present case (*see* Petition, pp. 21-23) and the discussion of the applicability of the Ninth Circuit's own precedent in *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994) (Petition, pp. 19, 20 and 22) in which the Ninth Circuit refused to apply a new limitations period to actions taken prior to the enactment of the new statute, as such application would revive a claim that otherwise could not have been brought.

Supreme Court Rule 10, which "indicate[s] the character of the reasons the Court considers" in determining whether to grant a petition for writ of certiorari provides in subparagraph "c" as follows:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

There can be no serious doubt that the present case falls squarely within Supreme Court Rule 10(c). In retroactively applying Bankruptcy Rule 7004(f) to an adversary proceeding

to confer jurisdiction where the claims would otherwise have been time barred, the Ninth Circuit effectively lengthened the applicable Statutes of Limitations for those claims, adversely impacting upon Petitioners' due process rights, an important federal right. Because Bankruptcy Rule 7004(f) is relatively new, the important federal question of whether this federal rule can be retroactively applied in derogation of Petitioners' federal due process rights has not been, but should be settled by this Court.

Moreover, the Ninth Circuit's decision is inconsistent with *Landgraf*. In rendering its decision, the Ninth Circuit failed to heed this Court's cautioning language that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," and further ignored this Court's stated preference for "the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case," and that "concerns about retroactivity" apply "to procedural rules." *Landgraf*, *supra* at 275 n.29. Had the Ninth Circuit followed this Court's methodology in *Landgraf*, or its own precedent in *Chenault*, the result would have been completely different and Petitioners' due process rights protected.

B. There Is No Basis For Personal Jurisdiction Over Petitioners Other Than Revised Bankruptcy Rule 7004, The Application Of Which Violates Petitioners' Due Process Rights

In another effort to distract this Court from determining whether Petitioners' due process rights have been impaired, Respondents claim without any support whatsoever that they gave the Ninth Circuit "no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed" and that at Respondents' "urging, the Court of Appeals embraced the least complicated of the three theories (without addressing the others) and found Petitioners subject to the jurisdiction of the Bankruptcy Court

under federal law (as opposed to under the Idaho long-arm statue [sic])" (Opp. Brief, p. 11). Putting aside Respondents' self-proclaimed partnership with the Court of Appeals, there is nothing in the Ninth Circuit's decision that indicated that it agreed with the lower court's application of the Idaho long-arm statute or the conspiracy theory of jurisdiction to Petitioners herein. In fact, the only objective manifestations of the Ninth Court's thinking lead to the opposite conclusion.

The Ninth Circuit granted Petitioners leave to appeal from the District Court's decision, indicating an intent to review that decision (and that of the Bankruptcy Court as well). Moreover, in its decision, the Ninth Circuit did not in any way address the propriety of or rely in any way on the lower courts' application of the Idaho long-arm statute and conspiracy theory of jurisdiction to find that personal jurisdiction had been stated against Petitioners. And, there was ample basis for the Ninth Circuit to refuse to apply these state based theories to the present case. Both sides thoroughly briefed these jurisdictional theories before the Court of Appeals and the Court of Appeals elected not to rely on these theories as a basis for finding jurisdiction.

In *Barr v. Matteo*, 335 U.S. 171 (1957), the case cited by Respondents in support of a denial of *certiorari* herein, the District Court ruled on petitioner's qualified privilege defense in a defamation suit, but the Court of Appeals refused to pass on such defense, on the grounds that petitioner had waived the defense by not addressing it in his initial brief to that court. This Court refused to grant *certiorari*, but remanded the case back to the Court of Appeals for consideration of the qualified privilege defense.

In the present case, no such waiver has taken place. The parties have fully briefed the issues relating to jurisdiction and such issues were before the Ninth Circuit. The Court of Appeals elected not to address the application of the Idaho long arm statute and/or the conspiracy theory of personal

jurisdiction to Petitioners. Thus, even assuming *arguendo* that Respondents are correct, under *Barr*, this Court should remand the case to the Ninth Circuit directing it to pass on the state theories of jurisdiction.

C. There Are No Facts For This Court To Review

In what can only be characterized as a throw-away argument, Respondents next contend that "the Court of Appeals based its finding on factual conclusions drawn by the Bankruptcy Court (and confirmed by the District Court) after its initial review of the Complaint and the various affidavits filed in this action" (Opp. Brief, p. 13).

Respondents well know that these issues were raised by Petitioners' motion to dismiss for lack of personal jurisdiction. On a motion to dismiss, all allegations in the complaint are deemed to be true. Thus, no findings of fact have been made and there are none to be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Dated: May 22, 1998

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